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# Wright is Still Wrong: The Wright Amendment Reform Act and Airline Competition at Dallas Love Field

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# WRIGHT IS STILL WRONG: THE WRIGHT AMENDMENT REFORM ACT AND AIRLINE COMPETITION AT DALLAS LOVE FIELD

BARRET V. ARMBRUSTER\*

## I. INTRODUCTION

IN 2006, CONGRESS REFORMED THE LAW known as the “Wright Amendment.”<sup>1</sup> The Wright Amendment, passed in 1979, restricted flights from Dallas Love Field Airport (Love Field) to destinations within Texas and its four contiguous neighboring states.<sup>2</sup> The purpose of the Wright Amendment was to protect a then nascent Dallas/Fort Worth International Airport (DFW) from allegedly harmful competition at Love Field.<sup>3</sup> Over the next twenty-five years, the restrictions of the Wright Amendment were slowly relaxed to permit selective service to certain destinations.<sup>4</sup> However, in the summer of 2006, Southwest Airlines (Southwest), American Airlines (American), DFW, and the cities of Dallas and Fort Worth issued a joint statement urging repeal of the Wright Amendment.<sup>5</sup> Their statement was

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<sup>1</sup> Wright Amendment Reform Act of 2006, Pub. L. No. 109-352, 120 Stat. 2011 (2006).

<sup>2</sup> See International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 29, 94 Stat. 35, 48–49 (1980).

<sup>3</sup> City of Dallas v. Delta Airlines, Inc., No. 3:15-CV-2069-K, 2016 WL 98604, at \*1 (N.D. Tex. Jan. 8, 2016).

<sup>4</sup> See *id.*

<sup>5</sup> Contract Among the City of Dallas, the City of Fort Worth, Southwest Airlines Co., American Airlines, Inc., and DFW International Airport Board Incorporating the Substance of the Terms of the June 15, 2006 Joint Statement Between the Parties to Resolve the “Wright Amendment” Issues 2–3 (July 11, 2006) [hereinafter Five Party Agreement], [http://www.dallas-lovefield.com/pdf/dal\\_ResolveWrightAmendment.pdf](http://www.dallas-lovefield.com/pdf/dal_ResolveWrightAmendment.pdf) [<https://perma.cc/5FGJ-25AC>].

quickly adopted by Congress and passed into law as the Wright Amendment Reform Act (WARA) in the fall of 2006.<sup>6</sup>

In addition to repealing the Wright Amendment, WARA places some significant restrictions on Love Field.<sup>7</sup> WARA prohibits nonstop international flights from the airport and, most importantly, requires a reduction in the number of gates from thirty-two to twenty.<sup>8</sup> WARA also includes “a significant amount of language likely aimed at thwarting any antitrust lawsuits.”<sup>9</sup>

To date, antitrust litigation against the parties that originally conceived WARA has been dismissed, leaving the validity of the statute unresolved.<sup>10</sup> Nonetheless, Dallas, Southwest, Delta Air Lines (Delta), and almost every other airline that operates at Love Field are currently litigating the allocation of Love Field’s limited gate space in federal court.<sup>11</sup> On January 8, 2016, Judge Ed Kinkeade ruled on Delta’s motion for a preliminary injunction barring Southwest from evicting Delta from Love Field. The ruling granted Delta’s request and preserved the status quo at Love Field for now.<sup>12</sup> However, it will take a trial, and many more years of litigation, to determine the respective rights of the airlines vying for the limited number of gates at Love Field.

This comment considers the first year of WARA’s enactment and whether the Wright Amendment has been sufficiently reformed to benefit airline passengers both in the Dallas-Fort Worth area and around the country. Accordingly, Part II will discuss the history of Love Field, DFW, the Wright Amendment, and WARA. Part III will examine the competition issues created by WARA, using Delta’s request for accommodation at Love Field and the resulting litigation as a case study. Part IV will explore the various avenues by which WARA might be legally challenged. Part IV will also include an analysis of the

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<sup>6</sup> See Wright Amendment Reform Act.

<sup>7</sup> See *id.* §§ 3, 5.

<sup>8</sup> *Id.*

<sup>9</sup> John Grantham, *A Free Bird Sings the Song of the Caged: Southwest Airlines’ Fight to Repeal the Wright Amendment*, 72 J. AIR L. & COM. 429, 455 (2007).

<sup>10</sup> See *Love Terminal Partners, L.P. v. City of Dallas*, 527 F. Supp. 2d 538 (N.D. Tex. 2007) (dismissing antitrust claims of leaseholders, whose facilities were decommissioned under the WARA gate reduction, for failure to state a claim).

<sup>11</sup> See *City of Dallas v. Delta Airlines, Inc.*, No. 3:15-CV-2069-K, 2016 WL 98604, at \*1 (N.D. Tex. Jan. 8, 2016).

<sup>12</sup> See *id.* As of the date of publication of this comment, Southwest’s appeal of Judge Kinkeade’s decision of January 8, 2016, remains pending before the Fifth Circuit. See *City of Dallas v. Delta Airlines, Inc.*, No. 16-10051 (5th Cir. Jan. 20, 2016).

constitutionality of WARA, the viability of antitrust litigation under WARA, and possible contract or tort claims that might loosen WARA's grip on airline competition at Love Field. Part V will urge the repeal of WARA and the end of Congress's meddling at Love Field. This final section will also look to another multi-airport city for guidance as to how DFW and Love Field might coexist while still allowing Love Field to grow.

## II. HISTORICAL BACKGROUND

The history of the troubles at Love Field can be traced to the genesis and growth of another airport: DFW. Dallas and Fort Worth engaged in a heated rivalry to dominate commercial aviation in North Texas for much of the twentieth century.<sup>13</sup> However, at the suggestion of the now defunct Civil Aeronautics Board (CAB), the cities came together in the 1960s to create "a single . . . airport for the Dallas-Fort Worth . . . region."<sup>14</sup> The new airport, DFW, opened in 1974.<sup>15</sup> However, when Southwest subsequently planned to expand its operations out of neighboring Love Field, Congress passed the Wright Amendment out of concern that the competition would hobble DFW.<sup>16</sup> This quest to find an appropriate competitive balance between DFW and Love Field spurred the subsequent easing of the Wright Amendment's restrictions on Love Field and the eventual reformation of the Wright Amendment in its entirety.

### A. LOVE FIELD, DFW, AND THE EARLY DAYS OF SOUTHWEST

Competition between Dallas and Fort Worth in the transportation arena dates back to the middle of the nineteenth century, when the cities jostled for the affection of the railroads.<sup>17</sup> Accordingly, when civil aviation came to North Texas, the two cities established their own respective airfields: Meacham Field in

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<sup>13</sup> *City of Dallas v. Sw. Airlines Co.*, 371 F. Supp. 1015, 1019 (N.D. Tex. 1973) ("For many years the Cities of Dallas and Fort Worth were engaged in a fierce, intense[,] and sometimes bitter rivalry for the business of commercial aviation and commercial air carriers."), *aff'd*, 494 F.2d 773 (5th Cir. 1974); see Grantham, *supra* note 9, at 432–33.

<sup>14</sup> TODD B. TATELMAN & JOHN W. FISCHER, CONG. RESEARCH SERV., RL32984, DALLAS LOVE FIELD: THE WRIGHT AND SHELBY AMENDMENTS 1 (2005).

<sup>15</sup> *Delta Airlines*, 2016 WL 98604, at \*1.

<sup>16</sup> *Id.*

<sup>17</sup> See DR. STANLEY H. SCOTT & LEVI H. DAVIS, A GIANT IN TEXAS: A HISTORY OF THE DALLAS-FORT WORTH REGIONAL AIRPORT CONTROVERSY 1911-1974, at 2 (1974).

Fort Worth and Love Field in Dallas.<sup>18</sup> Rapid advances in aircraft technology during the first part of the twentieth century made it unnecessary to have two expanding airfields within thirty miles of each other, so national and state aviation authorities later sought to broker a deal between the two cities and form a single regional airport that could accommodate the larger landing sites required for modern aircraft.<sup>19</sup> Dallas and Fort Worth did agree on a potential location for the new airport at the midpoint between the two cities, but Dallas withdrew from the venture in the 1940s, thereby scuttling negotiations to create the jointly operated regional airport.<sup>20</sup> With Meacham Field no longer able to accommodate all of the city's commercial aviation needs, Fort Worth later unilaterally established its own new airport, Amon Carter Field, near the proposed midway site for the still unrealized regional airfield.<sup>21</sup>

Meanwhile, Love Field grew.<sup>22</sup> Though Dallas continued to tussle with Fort Worth over the primacy of the region's airfields,<sup>23</sup> the city and several airlines invested in expanding Love Field's footprint, building a new terminal, extending runways, and modernizing the airport's existing facilities. "These improvements indicated that Love was a busy, modern airport."<sup>24</sup> After Amon Carter Field failed to take flight, Fort Worth officials renewed their efforts to establish a regional airport that would service both cities.<sup>25</sup>

In 1962, the CAB finally heeded Fort Worth's entreaties for the federal agency to intervene in the Dallas-Fort Worth area's airport quandary.<sup>26</sup> The CAB ordered one of the airlines servicing the area to provide an additional round-trip flight out of Amon Carter Field and launched an investigation of the region's air travel facilities and needs.<sup>27</sup> Hearings for the investigation commenced in 1963.<sup>28</sup> In 1964, the CAB unanimously ruled

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<sup>18</sup> *Id.* at 2-3.

<sup>19</sup> *Id.* at 3, 5.

<sup>20</sup> *Id.* at 6-9.

<sup>21</sup> *Id.* at 11, 20-21.

<sup>22</sup> *See id.* at 28.

<sup>23</sup> *Id.* (noting "the beginning of an almost endless fight between Dallas and Fort Worth").

<sup>24</sup> *Id.* at 34-35.

<sup>25</sup> *See id.* at 35, 39.

<sup>26</sup> *See id.* at 42-43.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 46.

that the region required a new aviation facility.<sup>29</sup> By 1965, Dallas and Fort Worth agreed to build the new regional airport, DFW, midway between the two cities.<sup>30</sup>

To ensure the success of DFW, the two cities sought to bind the airlines to move their operations to the new facility.<sup>31</sup> Accordingly, the cities obtained agreements with each airline servicing the market at the time.<sup>32</sup> The agreements provided that the airlines would move all of their flights in and out of the region to DFW.<sup>33</sup> While Love Field would not be completely abandoned, it remained unclear what use the airport might serve after the airlines moved to DFW.<sup>34</sup> The uncertainty of Love Field's status was further muddled by the arrival of Southwest in 1971.<sup>35</sup>

Southwest began as a small intrastate carrier flying between only three cities in Texas: Dallas, Houston, and San Antonio.<sup>36</sup> Despite the plan for all other carriers to move from Love Field to DFW upon the completion of the latter, Southwest informed the DFW airport authorities that it would not join the other carriers at DFW.<sup>37</sup> The decision prompted Dallas, Fort Worth, and DFW to sue Southwest in federal court, claiming that the CAB's 1964 ruling bound the plaintiffs to force Southwest to move to DFW with the other commercial carriers.<sup>38</sup> However, the trial court found that the CAB's decision did not bind the cities, the airport, or an intrastate carrier like Southwest.<sup>39</sup> Accordingly, the court permitted the still-budding Southwest to continue operating its intra-Texas flights out of Love Field while the other airlines prepared to move to DFW.<sup>40</sup>

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<sup>29</sup> *Id.* at 49.

<sup>30</sup> *Id.*

<sup>31</sup> See Grantham, *supra* note 9, at 437–38.

<sup>32</sup> *Id.* at 437.

<sup>33</sup> *Id.*

<sup>34</sup> See *id.* at 438.

<sup>35</sup> See *id.* at 438–39.

<sup>36</sup> *Southwest Corporate Fact Sheet*, SOUTHWEST, <http://www.swamedia.com/channels/Corporate-Fact-Sheet/pages/corporate-fact-sheet> [<https://perma.cc/7U66-KGUV>].

<sup>37</sup> *City of Dallas v. Sw. Airlines Co.*, 371 F. Supp. 1015, 1021 (N.D. Tex. 1973), *aff'd*, 494 F.2d 773 (5th Cir. 1974).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1022.

<sup>40</sup> See *id.* at 1035.

## B. THE WRIGHT AMENDMENT

Southwest continued to operate as an intrastate carrier until Congress enacted the Airline Deregulation Act (ADA) in 1978.<sup>41</sup> Congress promulgated the ADA “to encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services.”<sup>42</sup> As the ADA removed the federal government’s hold on regulating interstate air travel, Southwest quickly added interstate routes to its flight schedule.<sup>43</sup>

However, Southwest’s expansion to destinations outside of Texas renewed fears that Southwest’s activity at Love Field would deflect passengers from using DFW.<sup>44</sup> Fort Worth officials particularly feared that the prospect of Southwest’s interstate success at Love Field would draw other airlines to abandon DFW, thereby depriving the citizens of Fort Worth of a regional airport close to their city.<sup>45</sup> Among those who shared these fears was Fort Worth Congressman Jim Wright, then Majority Leader of the House of Representatives.<sup>46</sup>

To prevent Southwest and Love Field from competing with DFW, Wright tacked on an amendment to the International Air Transportation Competition Act.<sup>47</sup> Initial iterations of the amendment completely barred Love Field from hosting any interstate flights.<sup>48</sup> But after Southwest rallied support in the Senate, Congress eventually adopted a version of the amendment that did not completely restrict interstate travel from Love Field.<sup>49</sup> The final amendment read:

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<sup>41</sup> Eric A. Allen, *The Wright Amendment: The Constitutionality and Propriety of the Restrictions on Dallas Love Field*, 55 J. AIR L. & COM. 1011, 1017 (1990).

<sup>42</sup> Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978). “The ADA essentially removed government control from the airline industry and stripped the CAB from its power to regulate routes and fares.” Grantham, *supra* note 9, at 441 n.90.

<sup>43</sup> Grantham, *supra* note 9, at 440–41.

<sup>44</sup> Allen, *supra* note 41, at 1018.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1018–19; Grantham, *supra* note 9, at 441.

<sup>47</sup> See International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 29, 94 Stat. 35, 48–49 (1980); 125 CONG. REC. 32,148–50 (1979).

<sup>48</sup> See H.R. 5481, 96th Cong. § 29 (1979); H.R. REP. NO. 96-602, at 9 (1979); 125 CONG. REC. 32,149.

<sup>49</sup> Allen, *supra* note 41, at 1019; Grantham, *supra* note 9, at 441; see H.R. REP. NO. 96-716, at 24–26 (1979) (Conf. Rep.), as reprinted in 1980 U.S.C.C.A.N. 78, 86–88.

(a) *Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other office or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less.*

(b) Except as provided in subsections (a) and (c), notwithstanding any other provision of law, or any certificate or other authority heretofore or hereafter issued thereunder, no person shall provide or offer to provide the transportation of individuals, by air, for compensation or hire as a common carrier between Love Field, Texas, and one or more points outside the State of Texas, except that a person providing service to a point outside of Texas from Love Field on November 1, 1979, may continue to provide service to such point.

(c) *Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.*

(d) This section shall not take effect if enacted after the enactment of the Aviation Safety and Noise Abatement Act of 1979.<sup>50</sup>

Wright's amendment was henceforth known as the Wright Amendment.<sup>51</sup> The Wright Amendment restricted any carrier operating out of Love Field to either intrastate flights or interstate flights to one of the four states that share a contiguous border with Texas.<sup>52</sup> If the carrier flew to one of those four contiguous states, it could not provide "through service or ticketing"

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<sup>50</sup> International Air Transportation Competition Act § 29 (emphasis added).

<sup>51</sup> Grantham, *supra* note 9, at 441.

<sup>52</sup> International Air Transportation Competition Act § 29(c).



with another carrier or offer tickets to or from another state outside of those four contiguous states and Texas.<sup>53</sup> Despite the restrictive nature of the Wright Amendment, Southwest seemed untroubled by the legislation when it was passed.<sup>54</sup>

The Wright Amendment stood unchanged for more than fifteen years until Congress passed the Shelby Amendment in 1997.<sup>55</sup> Prompted by a Department of Transportation (DOT) opinion considering the Wright Amendment's exception<sup>56</sup> for aircraft configured to carry fewer than fifty-six passengers,<sup>57</sup> the Shelby Amendment clarified that "the term 'passenger capacity of 56 passengers or less' includes any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds."<sup>58</sup> Curiously, the Shelby Amendment also added three additional states to the list of destinations to which aircraft could fly from Love Field: Kansas, Alabama, and Mississippi.<sup>59</sup> Unfortunately, the legislative history behind the Shelby Amendment does not include Congress's reasoning for clarifying and easing the restrictions of the Wright Amendment.<sup>60</sup> Congress revisited the Wright Amendment less than a decade after the Shelby Amendment with WARA.<sup>61</sup>

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<sup>53</sup> *Id.*

<sup>54</sup> See Grantham, *supra* note 9, at 443–44 ("Prior to deregulation, Southwest had boxed itself into the state of Texas from Love Field by refusing to comply with the CAB order and requests of the cities of Dallas and Fort Worth and by relying wholly on the authority of the [Texas Aeronautics Commission] to conduct its Love Field service. Faced with a House of Representatives who preferred to restrict Southwest's Love Field operation to the pre-deregulation boundary lines of the State, when the Wright Amendment included provisions for interstate travel, the airline seemed supportive of the Wright Amendment. Southwest was now able to operate a 'safe-harbor' at convenient Love Field while other now deregulated airlines were bound under the Letter Agreements at DFW.").

<sup>55</sup> TATELMAN & FISCHER, *supra* note 14, at 4.

<sup>56</sup> See International Air Transportation Competition Act § 29(a)(2).

<sup>57</sup> In 1996, Legend Airlines petitioned the DOT to permit the airline to fly interstate routes from Love Field with airplanes that sat fifty-six passengers or less. TATELMAN & FISCHER, *supra* note 14, at 4. The DOT's Office of General Counsel clarified that only those "aircraft that were originally configured to hold fewer than 56 passengers" met the Wright Amendment restriction under § 29(a)(2). *Id.*

<sup>58</sup> Department of Transportation and Related Agencies Appropriation Act of 1998, Pub. L. 105-66, § 337(a), 111 Stat. 1425, 1447 (1997).

<sup>59</sup> *Id.* § 337(b).

<sup>60</sup> TATELMAN & FISCHER, *supra* note 14, at 4.

<sup>61</sup> See Wright Amendment Reform Act of 2006, Pub. L. No. 109-352, 120 Stat. 2011 (2006).

## C. THE WRIGHT AMENDMENT REFORM ACT

For the first twenty years of the Wright Amendment's existence, Southwest remained largely neutral as to whether the law was sensible or not.<sup>62</sup> However, in 2004, Southwest's neutrality ended.<sup>63</sup> The airline started a media blitz to push Congress to repeal the Wright Amendment, even threatening to move its headquarters from Dallas if the Wright Amendment remained in place.<sup>64</sup> Southwest's actions earned the airline a hearing before the Senate,<sup>65</sup> and Congress attempted to pacify what had become the nation's most profitable airline<sup>66</sup> by adding Missouri to the list of states to which Southwest could fly from Love Field.<sup>67</sup> However, despite this concession, Southwest continued to press for a full repeal of the Wright Amendment.<sup>68</sup>

In 2006, Dallas, Fort Worth, DFW, Southwest, and American convened to craft an amicable resolution to a quarter century of restrictions at Love Field.<sup>69</sup> The five parties' collaboration produced an agreement (the Five Party Agreement) that proposed a compromise by which the Wright Amendment might be repealed.<sup>70</sup> In exchange for lifting the geographic restrictions of the Wright Amendment, the Five Party Agreement provided for (1) reduction of the number of gates at Love Field from thirty-two to twenty; (2) prohibitions on subdividing gates and loading passengers by way of hardstands; (3) allocation of "preferential use" gates between Southwest (sixteen gates), American (two gates), and ExpressJet Airlines (ExpressJet) (two gates); (4) limitations on flight operation hours; and (5) barring all international flights from Love Field.<sup>71</sup> Dallas, Fort Worth, DFW, Southwest, and American presented the Five Party Agreement to Congress in June of 2006.<sup>72</sup>

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<sup>62</sup> Grantham, *supra* note 9, at 452.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See *The Wright Amendment: Hearing Before the Subcomm. on Aviation of the S. Comm. on Commerce, Sci., and Transp.*, 109th Cong. (2005).

<sup>66</sup> TATELMAN & FISCHER, *supra* note 14, at 8.

<sup>67</sup> Grantham, *supra* note 9, at 452–53; see Transportation, Treasury, Housing and Urban Development, the Judiciary, and Independent Agencies Appropriations Act of 2006, Pub. L. No. 109-115, § 181, 119 Stat. 2396, 2430 (2005).

<sup>68</sup> Grantham, *supra* note 9, at 453.

<sup>69</sup> *City of Dallas v. Delta Airlines, Inc.*, No. 3:15-CV-2069-K, 2016 WL 98604, at \*2 (N.D. Tex. Jan. 8, 2016).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*; Grantham, *supra* note 9, at 453–54.

<sup>72</sup> Grantham, *supra* note 9, at 453.

Congress adopted many of the provisions of the Five Party Agreement when it passed WARA.<sup>73</sup> First, WARA immediately changed the flight restrictions at Love Field so that carriers could through-ticket to and from any domestic or foreign destination, provided the flight to or from Love Field still routed through one of the states originally authorized by the Wright and Shelby Amendments.<sup>74</sup> And second, all restrictions on domestic air travel were scheduled to be lifted within eight years of the passage of WARA.<sup>75</sup>

However, the Five Party Agreement imposed limits as well as lifted them.<sup>76</sup> Pursuant to Section 3 of WARA, carriers may not offer nonstop flights to international destinations from Love Field.<sup>77</sup> Perhaps most importantly, Love Field's number of gates was slashed dramatically from thirty-two to twenty.<sup>78</sup> WARA grants the City of Dallas the authority to "determine the allocation of leased gates and manage Love Field in accordance with contractual rights and obligations existing as of the effective date of [WARA] for certificated air carriers providing scheduled passenger service at Love Field on July 11, 2006."<sup>79</sup> Moreover, WARA directs Dallas to "accommodate new entrant air carriers . . . [by] honor[ing] the scarce resource provision of the existing Love Field leases."<sup>80</sup>

Congress passed WARA and repealed the Wright Amendment on October 13, 2006.<sup>81</sup> WARA provided a clear timeline for lifting the flight restrictions that had burdened Love Field for more than thirty-five years by October 2014.<sup>82</sup>

### III. WHAT WRIGHT HATH WROUGHT: *CITY OF DALLAS V. DELTA AIRLINES, INC.* AND THE GAME OF MUSICAL CHAIRS AT LOVE FIELD

The repeal of the Wright Amendment and the October 2014 roll back of its restrictions on flights to or from Love Field were

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<sup>73</sup> *Delta Airlines*, 2016 WL 98604, at \*2.

<sup>74</sup> Wright Amendment Reform Act of 2006, Pub. L. No. 109-352, § 2(a), 120 Stat. 2011, 2011 (2006).

<sup>75</sup> *Id.* § 2(b).

<sup>76</sup> *See id.* §§ 3, 5.

<sup>77</sup> *Id.* § 3.

<sup>78</sup> *Id.* § 5(a).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *City of Dallas v. Delta Airlines, Inc.*, No. 3:15-CV-2069-K, 2016 WL 98604, at \*2 (N.D. Tex. Jan. 8, 2016).

<sup>82</sup> *See id.*

met with great enthusiasm.<sup>83</sup> However, it quickly became apparent that the new restrictions WARA imposed created new problems at Love Field.<sup>84</sup> As predicted by the airlines that were not party to the Five Party Agreement, “the reduction of gates combined with the guarantee to extend the leases held by American, Continental, and Southwest[ ] effectively shut out any other airline from serving Love Field.”<sup>85</sup> The stifling of airline competition at Love Field in the wake of WARA was brought into sharp focus when Delta sought accommodation for five of its flights at the airport in 2014.<sup>86</sup>

#### A. GATE LEASES AT LOVE FIELD IN THE WAKE OF WARA

As noted *supra*, WARA reduces the number of gates at Love Field from thirty-two to twenty.<sup>87</sup> WARA further provides that “Dallas . . . shall determine the allocation of leased gates and manage Love Field in accordance with contractual rights and obligations existing as of the effective date of this Act for certificated air carriers providing scheduled passenger service at Love Field on July 11, 2006.”<sup>88</sup> Accordingly, Dallas allocated the twenty remaining gates at Love Field according to the distribution set forth in the Five Party Agreement: sixteen for Southwest, two for American, and two for ExpressJet.<sup>89</sup>

The gate rights allocated to the selected airlines under the Five Party Agreement were termed “preferential use.”<sup>90</sup> Though “preferential use” was not defined in the Five Party Agreement,<sup>91</sup> the term was defined in the leases of the three airlines that were leasing gate space at Love Field at the time of the Five Party Agreement.<sup>92</sup> The leases defined “preferential use” as

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<sup>83</sup> See Terry Maxon, *It's the End of the Wright Amendment at Dallas Love Field*, DALL. MORNING NEWS (Oct. 13, 2014, 6:35 AM), <http://aviationblog.dallasnews.com/2014/10/its-the-end-of-the-wright-amendment-at-dallas-love-field.html/> [<https://perma.cc/39ZJ-59W6>] (detailing the celebrations of Southwest and Virgin the morning the restrictions lifted). The author of this comment also fondly remembers the first time he could fly direct from Love Field to his childhood home outside Washington, D.C., thereby avoiding the dreaded drive to DFW.

<sup>84</sup> See *Delta Airlines*, 2016 WL 98604, at \*3–5.

<sup>85</sup> Grantham, *supra* note 9, at 454.

<sup>86</sup> See generally *Delta Airlines*, 2016 WL 98604, at \*3.

<sup>87</sup> Wright Amendment Reform Act of 2006, Pub. L. No. 109-352, § 5(a), 120 Stat. 2011, 2012 (2006).

<sup>88</sup> *Id.*

<sup>89</sup> *Delta Airlines*, 2016 WL 98604, at \*2.

<sup>90</sup> See Five Party Agreement, *supra* note 5, at 3.

<sup>91</sup> *Delta Airlines*, 2016 WL 98604, at \*2.

<sup>92</sup> *Id.*

granting the lessee “primary, but not sole, use of the leased space.”<sup>93</sup>

In the event that another airline seeks accommodation to fly in or out of Love Field, WARA and the Five Party Agreement govern the process.<sup>94</sup> Specifically, WARA provides that, “[t]o accommodate new entrant air carriers, the city of Dallas shall honor the scarce resource provision of the existing Love Field leases.”<sup>95</sup> The Five Party Agreement addresses the topic as follows:

To the extent a new entrant carrier seeks to enter Love Field, the City of Dallas will seek voluntary accommodation from its existing carriers to accommodate the new entrant service. If the existing carriers are not able or are not willing to accommodate the new entrant service, then the City of Dallas agrees to require the sharing of preferential lease gates, pursuant to Dallas’[s] existing lease agreements.<sup>96</sup>

The provisions of WARA and the Five Party Agreement that speak to new entrant airline accommodation contemplate “the possibility of Love Field facilities becoming a ‘scarce resource’” after implementation of WARA’s gate restriction.<sup>97</sup> Pursuant to those provisions, Dallas’s leases with the airlines govern the procedure for accommodation.<sup>98</sup> Fortunately, the terms of the lease agreements between Dallas and the airlines are largely identical.<sup>99</sup>

The lease agreements between Dallas and the airlines recognize “the ‘need for open access and uniform treatment’” for new entrant carriers, providing “a procedure . . . when accommodation is sought.”<sup>100</sup> The procedure “requires [that] the Requesting Airline first exhaust all reasonable efforts to secure a *voluntary* arrangement for accommodations” from the lessee airlines.<sup>101</sup> If the new entrant’s “attempt for voluntary accommodation fails,” Dallas will notify the lessee airlines “that if a voluntary accommodation is not made within the 30-day time frame” enu-

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Wright Amendment Reform Act of 2006, Pub. L. No. 109-352, § 5(a), 120 Stat. 2011, 2012 (2006).

<sup>96</sup> Five Party Agreement, *supra* note 5, at 3.

<sup>97</sup> *Delta Airlines*, 2016 WL 98604, at \*3.

<sup>98</sup> See Wright Amendment Reform Act § 5(a); *Delta Airlines*, 2016 WL 98604, at \*3; Five Party Agreement, *supra* note 5, at 3.

<sup>99</sup> *Delta Airlines*, 2016 WL 98604, at \*3.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

merated under the lease agreements, Dallas will select one of the lessees to accommodate the new entrant.<sup>102</sup>

#### B. DELTA SEEKS ACCOMMODATION

Of the three original airlines who signed leases for “preferential use” of the reduced number of gates at Love Field, only Southwest remained by the fall of 2014 when the Wright Amendment’s flight restrictions were fully rolled back.<sup>103</sup> The protracted efforts of Delta to gain access to Love Field illustrate the difficulty of equitably allocating Love Field’s gates in this new era.

In 2009, Delta subleased partial use of American’s two gates to begin service from Love Field.<sup>104</sup> However, Delta’s flights were imperiled in October 2014 when Delta’s subleases expired and American divested its two gates to Virgin America (Virgin).<sup>105</sup> Accordingly, Delta notified Southwest, United Airlines (United), and Virgin in June of 2014 “to request voluntary accommodation for its five daily flights.”<sup>106</sup> Delta’s efforts were unsuccessful.<sup>107</sup> Pursuant to the lessee airlines’ leases, Dallas’s Department of Aviation Director, Mark Duebner, reached out to the lessee airlines to notify them “that unless Delta was accommodated within 30 days, Mr. Duebner would select one [of the lessee airlines] to comply with the accommodation order.”<sup>108</sup> Since no lessee airline responded to Delta’s accommodation request, Delta began to execute “temporary gate usage agreements” with various airlines at Love Field to continue its service.<sup>109</sup>

In mid-September 2014, Dallas notified United that it had been selected to accommodate Delta’s flights at its two gates.<sup>110</sup> However, on the day before Dallas sent the notice, “United entered into a gate usage agreement with Southwest for its use of

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at \*2. Continental acquired ExpressJet and then merged with United. *Id.* American divested its two gates to Virgin as a result of the American-U.S. Airways merger. *Id.*

<sup>104</sup> *Id.* at \*3.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at \*4. “During this time, United was operating only seven daily flights out of its two leased gates.” *Id.* Dallas chose United because of “United’s actual gate usage at that time.” *Id.*

United's two gates only for overflow purposes or irregular operations."<sup>111</sup> Southwest disputed Dallas's attempt to accommodate Delta on the grounds that Southwest planned "to 'ramp up' its [own] flight operations" using United's two gates.<sup>112</sup> After further objections from United, Dallas withdrew its accommodation order.<sup>113</sup> It later came to light that "Southwest offered \$120 million cash consideration for the preferential use of both United gates at Love Field, which was accepted by United on September 29, 2014."<sup>114</sup>

Though initially rebuffed, Delta did not cease its efforts for accommodation at Love Field.<sup>115</sup> On October 2, 2014, Delta renewed its request for accommodation with Dallas.<sup>116</sup> Accordingly, Dallas began its rounds of accommodation requests to the lessee airlines in December 2014.<sup>117</sup> However, the result was the same as before: none of the lessees agreed to voluntarily accommodate any of Delta's five flights.<sup>118</sup>

To address its quandary, Dallas sought the guidance of the DOT.<sup>119</sup> The DOT responded, indicating that Dallas "had legal obligations to accommodate Delta."<sup>120</sup> Indeed, "[t]he DOT emphasized the importance of accommodating a requesting airline and ensuring competition at this 'constrained' airport."<sup>121</sup>

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<sup>111</sup> *Id.* After its sublease of United's gates, Southwest then controlled ninety percent of the gates at Love Field.

<sup>112</sup> *Id.* In addition to disputing the interpretation of the lease agreements as to whether accommodation was required or merely procedural, Southwest's CEO, Gary Kelly, emailed Dallas's City Manager to drive home Southwest's point. *Id.* Kelly claimed that Dallas "once again . . . ha[d] taken steps to frustrate and impede Southwest Airlines' growth and success." *Id.* Kelly continued, "We thought that after working so hard to resolve the historic dispute between Dallas and Ft. Worth over our airports and then investing so massively to reinvent Love Field that we were finally past these acrimonious hardships with our hometown." *Id.* The email concluded, poignantly, "After 43 years of this, we have 'Dallas fatigue.' We are moving on to focus our corporate investments in those markets that place a value on them and their corporate residents." *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* (emphasis added); see David Koenig, *Southwest Paid \$120 Million for 2 Gates at Dallas Airport*, ASSOCIATED PRESS (Sept. 28, 2015, 8:38 PM), <http://bigstory.ap.org/article/22c68a3f3ea84a14b608d9b609fb137c/southwest-paid-120-million-2-gates-dallas-airport> [<https://perma.cc/3QXG-29YP>].

<sup>115</sup> *Delta Airlines*, 2016 WL 98604, at \*5.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

After failing to act again for almost two months, Dallas reached out to the DOT in February 2015 to get a second opinion.<sup>122</sup> DOT responded in June 2015, reiterating that the city's legal obligations required it to accommodate Delta.<sup>123</sup> Specifically, DOT clarified that "[Dallas] is required to accommodate a requesting carrier unless Love Field's facilities are fully-utilized at the time of the request, or the [lessees] at the time are selling tickets for future flights fully-utilizing the facilities."<sup>124</sup> To determine whether the facilities were fully-utilized, DOT indicated that Dallas could not evaluate the lessee airline's "unscheduled future expansion plans because it 'may give a [lessee airline] the ability to block a competitor's accommodation request by deciding or asserting, after a request is made, that it will expand service.'"<sup>125</sup> Nevertheless, despite DOT's urging, Dallas was unable, and unwilling, to procure accommodation for Delta from one of the lessee airlines at Love Field.<sup>126</sup>

### C. DALLAS SEEKS HELP FROM THE FEDERAL COURT

Faced with the termination of Delta's temporary gate usage agreement with United on July 6, 2015,<sup>127</sup> Dallas filed suit for declaratory relief in federal court in the Northern District of Texas.<sup>128</sup> Judge Ed Kinkeade, who drew the case, characterized the city's suit as a request to "[p]lease tell us what to do."<sup>129</sup> Southwest, Dallas, and Delta all filed cross motions for temporary restraining orders and preliminary injunctions against each

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* (quoting Letter from Kathryn B. Thomson, Gen. Counsel, Dep't of Transp., to Peter B. Haskell, Exec. Assistant City Attorney, City of Dall. (June 15, 2015)).

<sup>125</sup> *Id.* (quoting Letter from Kathryn B. Thomson, Gen. Counsel, Dep't of Transp., to Peter B. Haskell, Exec. Assistant City Attorney, City of Dall. (June 15, 2015)).

<sup>126</sup> *Id.* at \*6.

<sup>127</sup> Southwest honored Delta's 180-day temporary gate usage agreement with United once Southwest started subleasing United's two gates. *Id.* However, Southwest refused to extend the temporary gate usage agreement beyond the temporary agreement's July 2015 expiration date. *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*



other.<sup>130</sup> After three days of hearings in late September 2015,<sup>131</sup> the district court ruled in favor of Delta on January 8, 2016.<sup>132</sup>

Evaluating Delta's motion for a preliminary injunction, the court found that Delta had standing to sue for injunctive relief as a third-party beneficiary of Southwest's gate lease agreements with Dallas.<sup>133</sup> Moreover, the court held that "Southwest's schedule would clearly accommodate Delta when it made its initial request for voluntary accommodation . . . and for several months after."<sup>134</sup> Therefore, Southwest breached the accommodation provision of its gate lease with Dallas.<sup>135</sup>

The court further held that denying Delta's request for injunctive relief would eject the carrier from Love Field, causing Delta to "los[e] business and endure[ ] negative impact to its name and brand."<sup>136</sup> Accordingly, a substantial threat of irreparable harm balanced the scales of equity in favor of Delta and not Southwest.<sup>137</sup> Finally, the balance of public interest weighed in favor of Delta, as "the chaos and inconvenience of disrupted service by removing Delta from Love Field . . . would be a great disservice to the public."<sup>138</sup> Because Delta satisfied the four elements required for a preliminary injunction,<sup>139</sup> Judge Kinkeade granted Delta's motion and allowed Delta to continue flying from Love Field, for now.<sup>140</sup>

Before he concluded the memorandum opinion, however, Judge Kinkeade made a few prescient observations.

Love Field is unique in that it is the only airport in the United States that is controlled by a federal statute and is gate-constrained, thereby freezing growth. Love Field is in that respect

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<sup>130</sup> *Id.*

<sup>131</sup> The author's chance attendance at these hearings spurred the drafting of this comment.

<sup>132</sup> *Id.* at \*1, \*6.

<sup>133</sup> *Id.* at \*9.

<sup>134</sup> *Id.* at \*11.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at \*13.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at \*14.

<sup>139</sup> *Id.* at \*6 (citing *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974) (noting that "[t]o be entitled to a preliminary injunction, the movant must satisfy each of the following equitable factors: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) the threatened injury to the movant outweighs the threatened harm to the party sought to be enjoined; and (4) granting the injunctive relief will not disserve the public interest.")).

<sup>140</sup> *Id.* at \*14.

the most unique airport in the world; no other airport has to deal with Congressionally mandated no-growth and limited hourly flight restrictions. . . . To change this no-growth situation at Love Field, Congress will need to act. The political powers-that-be can address and correct these issues that face Love Field and new entrant airlines through repealing legislation unique to this airport. Without this change, new entrant airlines, [Dallas], [lessee airlines], and the citizens of Dallas will continue to face dilemmas like this one. The flying public deserves more courage from its elected officials about travel to and from Love Field. The time for these elected officials to consider an end to all constraints on Love Field is now.<sup>141</sup>

#### IV. WRANGLING WITH WRIGHT: THE VALIDITY OF WARA

The current, gate-constrained state of Love Field is untenable. However, the available avenues of challenging WARA in the courts are narrow and few. Because of the broad powers conferred under the Commerce Clause, WARA is not particularly susceptible to traditional constitutional attacks.<sup>142</sup> To date, WARA's beneficiaries have successfully weathered antitrust claims alleging monopoly at Love Field.<sup>143</sup> Moreover, though the contract and tort claims working their way through the Northern District of Texas may yet yield fruit,<sup>144</sup> WARA, the Five Party Agreement, and the Love Field leases' accommodation provisions do not provide a workable and sustainable solution for encouraging long-term competition and growth at Love Field. Nonetheless, these potential legal challenges to the validity of WARA deserve some consideration.

##### A. THE CONSTITUTIONALITY OF WARA

The constitutionality of the Wright Amendment and its progeny has not yet been successfully challenged.<sup>145</sup> In *Cramer v. Skinner*, the Fifth Circuit considered claims that the Wright Amendment unconstitutionally restricted interstate travel.<sup>146</sup>

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<sup>141</sup> *Id.* at \*15–16.

<sup>142</sup> *See* U.S. CONST. art. I, § 8, cl. 3.

<sup>143</sup> *See* Love Terminal Partners, L.P. v. City of Dallas, 527 F. Supp. 2d 538, 543 (N.D. Tex. 2007).

<sup>144</sup> *See, e.g.,* *Delta Airlines*, 2016 WL 98604, at \*1, \*14.

<sup>145</sup> *See* *Kansas v. United States*, 16 F.3d 436, 442 (D.C. Cir. 1994); *Cramer v. Skinner*, 931 F.2d 1020, 1032–33 (5th Cir. 1991); *Delta Airlines*, 2016 WL 98604, at \*15.

<sup>146</sup> *Cramer*, 931 F.2d at 1022.

The plaintiff claimed that the Wright Amendment violated fundamental rights under several provisions of the Constitution<sup>147</sup> and that Congress did not have a compelling interest to justify those violations.<sup>148</sup> However, the court affirmed summary judgment against the plaintiff on his right to interstate travel claim.<sup>149</sup> Citing *City of Houston v. Federal Aviation Administration*,<sup>150</sup> the court held that the Wright Amendment does not bar travelers from flying and merely makes travel to and from Love Field less convenient.<sup>151</sup> The D.C. Circuit considered a similar case in *Kansas v. United States* and ruled the same way.<sup>152</sup> Because WARA arguably makes travel to and from Love Field more convenient than it was under the Wright Amendment, challenging WARA under an interstate travel theory is even less likely to gain any traction with the courts.

Another possible, but likely ill-fated, constitutional argument may be made under the Commerce Clause. Article I provides that Congress may “regulate Commerce . . . among the several States.”<sup>153</sup> “[I]t is . . . well established that Congress has broad authority under the Clause.”<sup>154</sup> Congress’s power to regulate interstate commerce is not just limited to commerce among the states, “but extends to activities that ‘have a substantial effect on interstate commerce.’”<sup>155</sup>

A Commerce Clause challenge to WARA would almost certainly fail because WARA implicates one of the most basic forms of interstate commerce: the commercial movement of persons across state lines.<sup>156</sup> Accordingly, overruling WARA on the basis of a constitutional defect is largely impracticable.

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<sup>147</sup> Specifically, the plaintiff alleged that the Wright Amendment violated the Due Process Clause, U.S. CONST. amend. V; the Privileges and Immunities Clause, U.S. CONST. art. IV, § 2, cl. 1; the Assembly Clause, U.S. CONST. amend. I; and the Port Preference Clause, U.S. CONST. art. I, § 9, cl. 6. *Cramer*, 931 F.2d at 1029–30.

<sup>148</sup> *Id.* at 1030.

<sup>149</sup> *Id.* at 1032–33.

<sup>150</sup> *City of Houston v. Fed. Aviation Admin.*, 679 F.2d 1184, 1198 (5th Cir. 1982) (upholding perimeter restrictions at Washington’s National Airport).

<sup>151</sup> *Cramer*, 931 F.2d at 1030.

<sup>152</sup> *Kansas v. United States*, 16 F.3d 436, 442 (D.C. Cir. 1994).

<sup>153</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>154</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2585 (2012).

<sup>155</sup> *Id.* (quoting *United States v. Darby*, 312 U.S. 110, 118–19 (1941)).

<sup>156</sup> *See* Wright Amendment Reform Act of 2006, Pub. L. No. 109-352, § 3, 120 Stat. 2011, 2011 (2006).

## B. ANTITRUST AVENUES

Another legal challenge may arise under WARA from the field of antitrust. However, this route has already been attempted by former Love Field leaseholders who leased premises near the soon-to-be demolished gates prior to the gate reduction at the airport.<sup>157</sup> In *Love Terminal Partners, L.P. v. City of Dallas*, the leaseholders alleged several antitrust claims under the Sherman Act against the five signatories of the Five Party Agreement.<sup>158</sup> The defendants countered that their conduct in urging the passage of WARA was protected under the *Noerr-Pennington* doctrine.<sup>159</sup>

The U.S. District Court for the Northern District of Texas agreed and granted the defendants' motion to dismiss for failure to state a claim.<sup>160</sup> First, the court held that defendants' purpose in executing the Five Party Agreement, as it appeared on the face of the plaintiffs' complaint, was "to effect the amendment and eventual repeal of the Wright Amendment."<sup>161</sup> Second, the court further held that the defendants' conduct in discussing and drafting the Five Party Agreement was also protected under the *Noerr-Pennington* doctrine, even though the plaintiffs pleaded that defendants' conduct was clandestine and patently anticompetitive.<sup>162</sup> Accordingly, plaintiffs failed to state any claim regarding the defendants' pre-WARA conduct that was not protected by the *Noerr-Pennington* doctrine.<sup>163</sup>

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<sup>157</sup> See *Love Terminal Partners, L.P. v. City of Dallas*, 527 F. Supp. 2d 538, 543 (N.D. Tex. 2007).

<sup>158</sup> *Id.* at 547.

<sup>159</sup> *Id.* at 548. The *Noerr-Pennington* doctrine is derived from two seminal antitrust cases: *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). The doctrine provides that "parties who petition the government for governmental action favorable to them cannot be prosecuted under the antitrust laws even though their petitions are motivated by anticompetitive intent." *Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns, Inc.*, 858 F.2d 1075, 1082 (5th Cir. 1988). "*Noerr-Pennington* immunity also applies when private parties conspire with government officials to achieve the desired anticompetitive result." *Love Terminal Partners*, 527 F. Supp. 2d at 548 (citing *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 379–80 (1991)).

<sup>160</sup> *Love Terminal Partners*, 527 F. Supp. 2d at 543.

<sup>161</sup> *Id.* at 552.

<sup>162</sup> *Id.* at 553–54 ("Even assuming that some meetings during this period were clandestine, this fact is simply immaterial for purposes of applying *Noerr-Pennington*.").

<sup>163</sup> *Id.* at 557.

Most alarming, however, was the court's discussion of the defendants' post-WARA conduct.<sup>164</sup> First, as a threshold matter, the court held that the Five Party Agreement fell under the protection of the *Noerr-Pennington* doctrine and, therefore, could not be held void for violating antitrust law.<sup>165</sup> Second, the court observed that WARA "compels [the] defendants to implement the terms of the [Five Party Agreement]."<sup>166</sup> Finally, the court found that the Sherman Act<sup>167</sup> could coexist with WARA,<sup>168</sup> thereby absolving the defendants of antitrust liability for their continuing compliance with and conduct under WARA, regardless of whether such compliance or conduct is manifestly anticompetitive.<sup>169</sup>

While WARA may be susceptible to novel antitrust claims beyond the scope of this comment, *Love Terminal Partners* suggests that any antitrust challenge to the Five Party Agreement or the lessee airlines' conduct under that agreement will likely fall on deaf ears before the federal judiciary.<sup>170</sup>

### C. CONTRACT AND TORT CLAIMS

Although Delta's five daily flights out of Love Field lived to fly another day after Judge Kinkeade's ruling on the airline's motion for preliminary injunction,<sup>171</sup> the future of Delta's contract

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<sup>164</sup> See *id.* at 557–61.

<sup>165</sup> *Id.* at 558.

<sup>166</sup> See *id.* at 558–60.

<sup>167</sup> "The Sherman Act broadly prohibits contracts, combinations, or conspiracies in restraint of trade." *Id.* at 560 (citing 15 U.S.C. § 1).

<sup>168</sup> The court summarized the tension between antitrust law and WARA as follows:

By reducing the flight output at Love Field through a 20-gate restriction, allocating the gates at Love Field to uphold Southwest's dominance over the short-haul market, and requiring that the [plaintiffs'] Terminal be demolished, [WARA] almost undoubtedly conflicts with the Sherman Act. But the Sherman Act and [WARA] are capable of coexistence. Considered together, it is clear that Congress intends as the default rule that anticompetitive conduct be broadly prohibited by law. *But in the case of airline competition in the North Texas region, Congress is willing to tolerate and sanction some anticompetitive behavior as a means of effecting the eventual end to the Wright Amendment restrictions that hamstringing domestic flights to and from Love Field.*

*Id.* (emphasis added).

<sup>169</sup> *Id.* at 560–61.

<sup>170</sup> See *id.* at 543.

<sup>171</sup> See *City of Dallas v. Delta Airlines, Inc.*, No. 3:15-CV-2069-K, 2016 WL 98604, at \*1, \*14 (N.D. Tex. Jan. 8, 2016).

and tort claims has not yet landed.<sup>172</sup> Although the court found that “Delta . . . show[ed] a substantial likelihood of success on the merits of its (1) breach of contract claim against Southwest and (2) declaratory judgment claim that it is entitled to be accommodated by Southwest,”<sup>173</sup> the fact that Delta was granted injunctive relief does not ensure success on the merits at trial.<sup>174</sup> It will likely be years until Delta’s challenge even makes it to trial, and then longer still as the trial decision makes its way through the appeal process. Given the length, cost, and inherent uncertainty of litigation, challenges to the lessee airlines’ conduct under traditional contract and tort claims do not provide a satisfactory vehicle to promote competition at Love Field. Instead, congressional action is required.

#### V. WRIGHT IS STILL WRONG: BACK TO THE DRAWING BOARD

In the absence of judicial action to set aside WARA’s arbitrary gate constraints, the flying public must look to Congress to go back to the drawing board and re-reform the Wright Amendment. Legislative action is necessary because while fares to and from North Texas have fallen dramatically since WARA took effect in 2014, fares could be even lower.<sup>175</sup> Moreover, Love Field’s growth is now capped at twenty gates; future growth will have to come from the airlines adding more flights to, or flying larger planes from, those twenty gates.<sup>176</sup> Many other American cities have two or more airports that do not require congressional hand-holding to balance growth and competition in their respective markets.<sup>177</sup> This section of the comment will look to one of those cities as an example for a new Wright-less path forward for Love Field and DFW.

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<sup>172</sup> See *id.* at \*7.

<sup>173</sup> *Id.* at \*12.

<sup>174</sup> See *id.* at \*15 (“As previously stated, none of these factual findings and/or conclusions of law are binding at a trial on the merits.”).

<sup>175</sup> See Andrea Ahles, *North Texas Airfares Down Dramatically Since Wright Amendment Ended*, FORT WORTH STAR-TELEGRAM (Jan. 20, 2016, 2:29 PM), <http://www.star-telegram.com/news/business/aviation/sky-talk-blog/article55663375.html> [<https://perma.cc/3CFB-NYZ7>].

<sup>176</sup> Sheryl Jean, *After Wright, All’s Right for Airlines*, DALL. MORNING NEWS (Oct. 13, 2015, 9:14 AM), <http://www.dallasnews.com/business/airline-industry/2015-10-12-after-wright-all-right.ece> [<https://perma.cc/VW7C-FA38>].

<sup>177</sup> See, e.g., CHI. DEP’T OF AVIATION, <http://www.flychicago.com/Pages/LandingPage.aspx> [<https://perma.cc/RLB9-ZT5M>].

A. WARA HAS INCREASED CONVENIENCE AND LOWERED FARES,  
BUT AT WHAT COST TO THE CONSUMER?

Since WARA took effect in October 2014, the airlines have certainly benefited.<sup>178</sup> But has the flying public? The answer has been a resounding yes.<sup>179</sup> In addition to new flights to new destinations,<sup>180</sup> North Texans have seen lower fares.<sup>181</sup> Fares to or from Love Field and DFW fell thirteen percent from late 2013 to late 2014.<sup>182</sup> And fares continue to drop.<sup>183</sup> As of January 2016, average airfares in the North Texas region were at their cheapest since 2010.<sup>184</sup>

However, it is important to note that WARA's lifting of flight restrictions from Love Field has coincided with another powerful factor that drives down airfares: falling oil prices.<sup>185</sup> Moreover, Southwest's primary competitor in the market, American, has "aggressively lowered fares at DFW when its flights compete against a low-cost carrier such as Spirit or Frontier."<sup>186</sup> With declining jet fuel prices and the arrival of low-cost carriers at DFW, WARA's correlation with lower fares appears more tenuous. As there is no guarantee that oil prices will stay down, WARA's honeymoon period with the flying public may come to an end when airfares eventually increase.

If and when fares do increase, travelers to and from Love Field will be at a disadvantage because of WARA's anticompetitive gate restrictions. "Competition helps keep fares reasona-

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<sup>178</sup> See Jean, *supra* note 176 ("Passenger traffic at Love jumped nearly 88 percent—or 607,249 more people—from September 2014 through August [2015]. Southwest accounted for 90 percent of that increase, with its traffic up 79 percent.").

<sup>179</sup> See Ahles, *supra* note 175; Jean, *supra* note 176.

<sup>180</sup> Jean, *supra* note 176 ("Southwest . . . expanded from 118 departures to 16 cities before Oct. 13, 2014, to 180 flights to 50 cities [in October 2015].").

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> See Ahles, *supra* note 175 ("According to government data released [in January 2016], average fares at Love Field dropped 6.5 percent in the second quarter of 2015, compared with the same period of 2014, as [Southwest] added nonstop routes and flights. To compete, [American] and other carriers lowered their prices at [DFW], driving average airfares down at the region's major airport by 6 percent during the period.").

<sup>184</sup> *Id.* ("[F]ares have dropped anywhere from 3 to 48 percent on [Southwest's fifteen new nonstop] routes out of Love Field and 3 to 26 percent on the same routes out of DFW.").

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

ble.”<sup>187</sup> If more airlines were permitted to fly from Love Field, airfares could be even lower and consumers would have even more route choices.<sup>188</sup> As it stands, however, the gate restrictions at Love Field and the physical impossibility of flying more than a certain number of flights per day from those gates will continue to limit the number of airlines that can fly from the airport. As such, Love Field’s growth may plateau as early as 2019.<sup>189</sup> Without competition and growth, consumers flying to or from Love Field will be at the mercy of fluctuating fuel prices and subject to the whim of those lessee airlines lucky enough to possess any of Love Field’s precious gates.

#### B. THE APPROACH OF ANOTHER MULTI-AIRPORT CITY

The driving force behind Congress’s meddling at Love Field has always been a concern for the competitiveness of DFW. Congress posits that an unrestrained Love Field would take too many customers and flights away from DFW because Love Field is more conveniently located near downtown Dallas.<sup>190</sup> However, the elimination of the Wright Amendment’s flight restrictions under WARA has shaken this line of thinking. Since WARA took effect in October 2014, DFW “saw 592,617 more passengers, up 11 percent from September 2014 to August [2015].”<sup>191</sup> Moreover, despite increased competition from Love Field, DFW remains the busiest airport in North Texas.<sup>192</sup> In August 2015, DFW received more than 5.8 million passengers to Love Field’s 1.3 million.<sup>193</sup> The gap between DFW and Love Field is unlikely to close any time soon.<sup>194</sup> In addition to WARA’s gate restrictions, Love Field is further limited by its proximity to residential areas, local noise ordinances, and a lack of adequate parking facilities.<sup>195</sup> In short, DFW has come of age and no longer requires congressional supervision to make its way in the world. A brief overview of another multi-airport city whose airports are not limited by national legislation demonstrates that DFW and

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<sup>187</sup> *Id.* (internal quotation marks omitted).

<sup>188</sup> *Id.*

<sup>189</sup> Jean, *supra* note 176.

<sup>190</sup> *See supra* Part II.B.

<sup>191</sup> Jean, *supra* note 176.

<sup>192</sup> *See id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*



Love Field can successfully grow and coexist in a WARA-less future.

### 1. *Chicago, Illinois*

Chicago, Illinois, has two major airports: O'Hare International Airport (O'Hare) and Midway International Airport (Midway).<sup>196</sup> The two airports are approximately twenty-eight miles from one another, and Midway is approximately eight miles closer to downtown Chicago than O'Hare.<sup>197</sup> O'Hare has 189 gates, the majority of which are leased to United (seventy-nine gates) and American (sixty-eight gates).<sup>198</sup> Midway has forty-three gates,<sup>199</sup> thirty-five of which are used by Southwest.<sup>200</sup> In 2015, almost 77 million passengers passed through O'Hare.<sup>201</sup> More than 22 million passed through Midway during the same period.<sup>202</sup> Congress has imposed no limit on the number of gates that may be built at either O'Hare or Midway.

The current balance between O'Hare and Midway could be a preview of air travel in the Dallas-Fort Worth region in a WARA-less future. O'Hare clearly remains successful despite the close proximity of another competing airport.<sup>203</sup> Further, Midway's 22

<sup>196</sup> See CHI. DEP'T OF AVIATION, *supra* note 177.

<sup>197</sup> Driving Directions from Chicago Midway Airport to O'Hare Int'l Airport, GOOGLE MAPS, <https://www.google.com/maps/dir/Midway+International+Airport,+South+Cierro+Avenue,+Chicago,+IL/O%E2%80%99Hare+International+Airport> [<https://perma.cc/2HN4-A3W7>]; Chicago O'Hare Airport to and from Chicago Downtown, CRSA.COM, <http://www.clinicalrobotics.com/index.php/crsa-2009-chicago/chicago-ohare-airport-to-and-from-chicago-downtown/> [<https://perma.cc/S6FD-Q4X6>]; Carol Luther, *The Best Way to Get to Chicago Union Station from Chicago Midway Airport*, USA TODAY, <http://traveltips.usatoday.com/way-chicago-union-station-chicago-midway-airport-43702.html> [<https://perma.cc/V5H7-B76G>].

<sup>198</sup> *Facility Data*, CHI. DEP'T OF AVIATION, <http://www.flychicago.com/OHare/EN/AboutUs/Facts/Pages/Facility-Data.aspx> [<https://perma.cc/T6XH-RC5R>].

<sup>199</sup> *Id.*

<sup>200</sup> *Airport Information*, SOUTHWEST, <https://www.southwest.com/html/air/airport-information.html> [<https://perma.cc/9SEM-94FM>].

<sup>201</sup> *Monthly Operations, Passengers, Cargo Summary by Class for December 2015: O'Hare International Airport*, CHI. DEP'T OF AVIATION (2016), <http://www.flychicago.com/SiteCollectionDocuments/OHare/AboutUs/Facts%20and%20Figures/Air%20Traffic%20Data/1215%20ORD%20SUMMARY.pdf> [<https://perma.cc/5N5G-UAZV>].

<sup>202</sup> *Monthly Operations, Passengers, Cargo Summary by Class for December 2015: Midway Airport*, CHI. DEP'T OF AVIATION (2016), <http://www.flychicago.com/SiteCollectionDocuments/OHare/AboutUs/Facts%20and%20Figures/Air%20Traffic%20Data/1215%20MDW%20SUMMARY.pdf> [<https://perma.cc/D8NH-Q2GJ>].

<sup>203</sup> O'Hare is one of the world's busiest airports. See Gregory Karp, *O'Hare Regains Title of World's Busiest Airport*, CHI. TRIB. (Jan. 21, 2015, 2:10 PM), <http://>

million passengers in 2015 dramatically surpass the 14 million who flew through Love Field in the same year.<sup>204</sup> The balance of passenger traffic through Chicago's two major airports demonstrates that an increase in the number of gates and a possible attending increase in the number of passengers at Love Field would not greatly shift the competitive balance between Love Field and DFW.

### C. THE PATH FORWARD

WARA's gate restriction is arbitrary and rooted in an outdated analysis. DFW is now one of the busiest airports in the world; it no longer requires the kind of congressional oversight that the Wright Amendment embodied. Love Field may be thriving in the absence of the Wright Amendment's geographical restrictions, but the thriving business at Love Field faces a hard cap in the next decade. Unless the airlines can find a way to accommodate more flights at the limited number of gates allowed at Love Field under WARA, there will be no other way for the airport to accommodate more passengers or additional new entrant airlines. This cap on competition will inevitably lead to higher fares for the consumer and more litigation between the entrant airlines struggling to get a finger-hold at Love Field. This situation is untenable and requires action.

Unfortunately, as discussed earlier in the comment, there is little chance that WARA or the conduct of the lessee airlines under the law can be efficiently and effectively challenged in the courts.<sup>205</sup> WARA is likely constitutional, the law protects the lessee airlines acting pursuant to it from antitrust liability, and the contract or tort claims that might be made against the current lessee airlines will demand years of litigation with no guaranteed outcome. If passengers or entrant airlines cannot challenge WARA judicially, then they must go to the source of the law for change: Congress.

Unfortunately, Congress is unlikely to repeal WARA in the near future. Absent a change of heart from one of the airlines that is a party to the Five Party Agreement, either Southwest or American, Congress will likely continue to honor the Five Party

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[www.chicagotribune.com/business/ct-ohare-busiest-airport-0122-biz-20150121-story.html](http://www.chicagotribune.com/business/ct-ohare-busiest-airport-0122-biz-20150121-story.html) [<https://perma.cc/5TMW-6ZCN>].

<sup>204</sup> *Dallas Love Field Total Passengers: December 2015*, DALL. LOVE FIELD (2015), <http://www.dallas-lovefield.com/pdf/statistics/201512AircraftActivity.pdf> [<https://perma.cc/8AW6-8T5G>].

<sup>205</sup> See *supra* Part IV.

Agreement that spurred the passage of WARA. It will probably take the fruition of the outcomes enumerated *supra* to move either the airlines or a sufficient number of the flying public to urge Congress to re-reform the Wright Amendment. Until that day, however, the lessee airlines and Delta will continue to move as many people as possible through an inadequate number of gates.

## VI. CONCLUSION

WARA was born of a noble purpose: to free Love Field from the restrictive grasp of the Wright Amendment. The Wright Amendment served its purpose for almost a quarter century by allowing DFW to grow unfettered by tangible competition for interstate flights from nearby Love Field. However, DFW has now come of age. It is among the busiest airports in the world and continues to grow even in the face of increased competition from Love Field. Accordingly, it is no longer necessary that DFW receive preferential treatment from Congress in the form of restrictions on Love Field.

Nonetheless, the Five Party Agreement and its progeny, WARA, continue to restrain Love Field. What has issued from the Five Party Agreement and WARA is “a game of musical chairs with Love Field gate space.”<sup>206</sup>

Through WARA’s gate restrictions, Congress has codified an untenable status quo. Southwest will continue to dominate Love Field because it controls ninety percent of the airport’s gates. Virgin will continue to have two gates. But any other airline that attempts to compete at Love Field will be forced to seek accommodation with the city of Dallas, which has shown itself to be an inept conduit for fostering competition at Love Field. When faced with Delta’s accommodation requests in 2014 and 2015, the city tucked tail and ran, first to the DOT, which twice reminded the city of its legal obligations to accommodate Delta, and then to the federal court, which will spend the next several years trying to do what the city could not: enforcing Delta’s accommodation at Love Field. Any other airline even considering an attempt to compete at Love Field would be foolish to try now,

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<sup>206</sup> City of Dallas v. Delta Airlines, Inc., No. 3:15-CV-2069-K, 2016 WL 98604, at \*12 (N.D. Tex. Jan. 8, 2016) (“The Court finds Southwest and [Dallas] are playing a game of musical chairs with Love Field gate space, and with Virgin’s ‘chairs’ not in play in this game, there’s no ‘chair’ for Delta—Southwest occupies all 18 gates and the City consents.”).

given that such an attempt will almost certainly spell years of litigation with no certain outcome.

The dearth of competition at Love Field will eventually manifest itself in the form of higher fares for the consumer. Currently, Love Field is thriving without the geographic restrictions of the Wright Amendment. The enactment of WARA, coinciding with falling oil prices, has driven down North Texas airfares to their lowest mark in six years. Times will not always be so good and jet fuel prices will likely rise again. In the absence of competition at Love Field, what impetus do the lessee airlines have not to pass all rising costs to the consumer?

WARA is flawed and requires reformation or repeal. However, the route to change is littered with obstacles. A constitutional attack on the law is unlikely to succeed: Congress's power to regulate interstate commerce under the Commerce Clause is too broad and WARA does not seem to violate any constitutional rights. An attack on the Five Party Agreement under antitrust principles also appears barred. This leaves only one route to challenging WARA: Congress.

Unfortunately, congressional action to reform or repeal WARA is unlikely in the near term. Unless Southwest or American denounces the Five Party Agreement, Congress will continue to bow to the wishes of the contracting parties. Southwest seems content for the moment with the outcome of WARA; the airline's current focus is on expelling Delta from Love Field so that it can fully utilize its eighteen gates. There is no indication that American would advocate an increase in the number of gates at Love Field, since any increase in capacity at Love Field is a potential threat to American's hub at DFW. Accordingly, absent a catastrophic accident caused by too many aircraft trying to deplane and enplane at too few gates, the status quo under WARA will likely continue for the foreseeable future.